Mar-Jan, Inc. d/b/a Day's Metal Fab a/k/a Emerson Sheet Metal *and* Sheet Metal Workers International Association, Local No. 16, AFL-CIO. Case 36-CA-4459

31 August 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

Upon a charge filed by the Union on 24 June 1983 the General Counsel of the National Labor Relations Board issued a complaint on 3 August 1983 against the Respondent alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. Copies of the charge and complaint were served on the parties to this proceeding.

The complaint alleges that on 14 December 1982 the Respondent gave notice to reopen the collective-bargaining agreement between the Respondent and the Union which by its terms extended to 31 March 1983 and from year to year thereafter unless a party gave notice to reopen. The complaint also alleges that despite repeated requests the Respondent then refused to meet and bargain with the Union at reasonable times and engaged in general delaying and stalling tactics to avoid bargaining with the Union between 1 January and 17 June 1983. The complaint further alleges that since on or about 1 April 1983 the Respondent has failed and refused to continue in effect the wage scales and other provisions of the above-noted agreement and has failed to make the required health and welfare and pension trust contributions. The complaint alleges that all these subjects are mandatory subjects for the purpose of collective-bargaining. The complaint further alleges that the Respondent implemented the aforementioned changes without providing the Union notice or an opportunity to bargain concerning such changes. The Respondent timely filed an answer and an amended answer to the complaint, admitting in part and denying in part the allegations.

On 3 January 1984 the General Counsel filed a "Motion to Dismiss Allegation of Complaint and for Summary Judgment." On 29 February 1984 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent has filed no response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion to Dismiss Allegation of Complaint and for Summary Judgment

The Respondent's amended answer to the complaint admits that it was party to a collective-bargaining agreement with the Union which by its terms extended to 31 March 1983 and from year to year thereafter unless a party provided notice to reopen. The Respondent's amended answer further admits that after it provided notice to reopen the agreement on 14 December 1982 and despite receiving repeated requests to bargain the Respondent refused to meet and bargain with the Union at reasonable times between 1 January and 17 June 1983. The Respondent's amended answer also admits that since 1 April 1983 it failed and refused to continue in effect the wage scales and other provisions of the above-noted agreement and has failed to make the required health and welfare and pension trust fund contributions without providing the Union notice of or an opportunity to bargain concerning such changes. The Respondent also admits these are mandatory subjects of bargaining.

The Respondent denies the complaint allegation that it engaged in general delaying and stalling tactics to avoid bargaining with the Union. The General Counsel requests that that portion of the complaint alleging such conduct be dismissed, which request we hereby grant. The Respondent's amended answer denies no other factual allegation. Thus, the General Counsel's complaint raises no disputed factual issues. The Respondent denies, however, the conclusory paragraph that alleged the Respondent has violated Section 8(a)(1) and (5) of the Act.

We find no merit to the Respondent's denial. Section 8(d) of the Act defines the obligation to bargain collectively under Section 8(a)(5) as the duty "to meet at reasonable times and confer in good faith with respect to . . . the negotiation of an agreement." The Respondent has expressly conceded that it failed to fulfill this duty by its admission that after providing notice to reopen its agreement with the Union the Respondent then refused to meet and bargain with the Union at reasonable times.

Furthermore, it is well established that an employer acts in derogation of its bargaining obligations under Section 8(d) when it unilaterally changes existing terms and conditions of employment. *NLRB v. Katz*, 369 U.S. 736 (1962). It is also axiomatic that an employer's duty to bargain over established terms and conditions of employment is not relieved by the expiration of a collective-bar-

gaining agreement.[1] Thus, the Respondent has also failed to fulfill its 8(a)(5) bargaining obligations based on its admission that since on or about the expiration date of the parties' collective-bargaining agreement it has changed terms and conditions of employment established under the parties' agreement without providing the Union notice or an opportunity to bargain concerning such changes. We therefore find that no material issues of fact or law exist in this proceeding which warrant a hearing. Accordingly, we grant the General Counsel's motion.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Oregon corporation, is engaged in the construction industry in sheet metal fabrication and installation. During the past year, the Respondent purchased materials from outside the State having value of $50,000. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Unit*

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All employees employed by Respondent, excluding office clerical employees, guards and supervisors as defined in the Act.

B. *Respondent's Refusal to Bargain and Unilateral Changes*

Between 1 January and 17 June 1983 the Respondent failed and refused to bargain with the Union at reasonable times. Since on or about 1 April 1983 the Respondent has also failed and refused to continue in effect wage scales and other terms and conditions of employment set forth in the agreement and has failed to make required health and welfare and pension trust fund contributions within the meaning of Section 8(a)(5) and (1) of the Act.

[1] *NLRB v. Cauthorne Trucking*, 691 F.2d 1023, 1025 (D.C. Cir. 1982); *Rayner v. NLRB*, 665 F.2d 970, 977 (9th Cir. 1982); *Hinson v. NLRB*, 428 F.2d 133, 137 (8th Cir. 1970).

CONCLUSIONS OF LAW

1. Day's Metal Fab is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Sheet Metal Workers International Association, Local No. 16, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. All employees of the Respondent, excluding office clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
4. At all times material herein the Union has been the exclusive collective-bargaining representative of all the employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.
5. By the acts and conduct described in section II,B, above, the Respondent has failed and refused to bargain collectively in good faith and thereby has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.
6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. We shall order that the Respondent make whole the employees by paying all health and welfare and pension trust fund contributions required by the expired collective-bargaining agreement which have not been paid as a result of the Respondent's unilateral discontinuance of such payments since 1 April 1983.[2] We shall also order that the Respondent make whole employees for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful conduct, retroactive to 1 April 1983, with interest as provided for in *Florida Steel Corp.*, 231 NLRB 651 (1977).[3]

[2] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide for interest at a fixed rate on fund payments due as part of a "make-whole" remedy. We therefore leave to further proceedings the question of how much interest the Respondent must pay into the benefit fund in order to satisfy our make-whole remedy. These additional amounts may be determined, depending on the circumstances of each case, by reference to provisions in the documents governing the fund at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful action, which of funds withheld, additional administrative costs, etc., but not collateral losses. See *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

[3] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

ORDER

The National Labor Relations Board orders that the Respondent, Mar-Jan, Inc. d/b/a Day's Metal Fab a/k/a Emerson Sheet Metal, Albany, Oregon, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively upon request concerning wages, hours, and other terms and conditions of employment with Sheet Metal Workers International Association, Local No. 16, AFL–CIO, as the exclusive representative for purposes of collective bargaining for employees in the following unit:

> All employees employed by Respondent, excluding office clerical employees, guards and supervisors as defined in the Act.

(b) Unilaterally and without notice to or bargaining with the Union changing the terms and conditions of employment of the aforementioned individuals.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively with the Union as the exclusive representative of all employees in the aforesaid appropriate unit with respect to wages, hours, and other terms and conditions of employment.

(b) Make whole all employees in the manner set forth in the section of this Decision entitled "Remedy" by making contributions to the health and welfare and pension trust fund required by the expired collective-bargaining agreement which the Respondent has unilaterally withheld since 1 April 1983.

(c) Make whole all employees in the manner set forth in the section of this Decision entitled "Remedy" by reimbursing them with interest for any loss of wages or other benefits they may have suffered as a result of the Respondent's failure since 1 April 1983 to abide by the terms and conditions of employment set forth in the expired collective-bargaining agreement.

(d) Honor and continue in effect the terms and conditions of employment set forth in the expired collective-bargaining agreement until such time as the Respondent negotiates in good faith to a new agreement or to an impasse.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or useful in checking compliance with this Order.

(f) Post at its place of business in Albany, Oregon, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[4] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively upon request concerning wages, hours, and other terms and conditions of employment with Sheet Metal Workers International Association, Local No. 16, AFL–CIO, as the exclusive representative for purposes of collective bargaining for employees in the following unit:

> All employees employed by the Employer, excluding office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally and without notice to or bargaining with the Union change the terms and conditions of employment of the aforementioned individuals.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively with the Union as the exclusive representative of all employees in the aforesaid appropriate unit with re-

spect to wages, hours, and other terms and conditions of employment.

WE WILL make whole our employees by making contributions to the health and welfare and pension trust fund as required by the expired collective-bargaining agreement which the Employer has unilaterally withheld since 1 April 1983.

WE WILL make whole our employees, with interest, for any loss of wages or other benefits they may have suffered as a result of the Employer's failure since 1 April 1983 to abide by the terms and conditions of employment set forth in the expired collective-bargaining agreement.

WE WILL honor and continue in effect the terms and conditions of employment set forth in the expired collective-bargaining agreement until such time as we negotiate in good faith to a new agreement or to an impasse.

MAR-JAN INC. D/B/A DAY'S METAL FAB A/K/A EMERSON SHEET METAL